

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
ROBERT N. FELGAR*
ERIC FISHMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS

* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

FRANK U. FLETCHER*
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)

RETIRED
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH

WRITER'S DIRECT

812-0474

kersting@fhh-telcomlaw.com

October 13, 1998

BY HAND DELIVERY

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

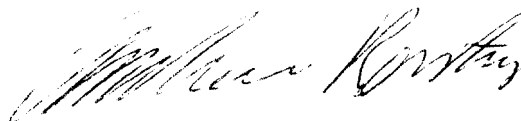
Re: Comments of Metro Broadcasters-Texas, Inc.
MM Docket Nos. 97-26 and 97-91
(Detroit, Howe and Jacksboro, Texas, and
Antlers and Hugo, Oklahoma, et al.)

Dear Ms. Salas:

Transmitted herewith on behalf of Metro Broadcasters-Texas, Inc. are an original and four copies of its Comments filed in response to the "Opposition to Request for Immediate Issuance of Erratum," filed September 24, 1998, by K95.5, Inc. in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for Metro Broadcasters-Texas, Inc.

Enclosure

cc (w/ encl.): Certificate of Service (by hand & first-class mail)

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Detroit, Howe and Jacksboro, Texas,
Antlers and Hugo, Oklahoma)

MM Docket No. 97-26
RM-8968
RM-9089
RM-9090

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Lewisville, Gainesville, Robinson,
Corsicana, Jacksboro, and
Mineral Wells, Texas)

MM Docket No. 97-91
RM-8854
RM-9221

To: Chief, Allocations Branch

COMMENTS OF METRO BROADCASTERS-TEXAS, INC.

Metro Broadcasters-Texas, Inc. ("Metro"), by its counsel, hereby submits its comments regarding the "Opposition to Request for Immediate Issuance of Erratum," filed September 24, 1998 ("Opposition"), by K95.5, Inc. ("K95.5").¹ In support of these comments, the following is stated:

¹ At page 1, note 1, of its Opposition, K95.5 "presumes" that Great Plains Radiocasting's "Request for Immediate Issuance of an Erratum," dated September 3, 1998, constitutes a petition for reconsideration of the *Report and Order*, DA 98-1650 (released August 21, 1998), in this proceeding, and requests that its Opposition be treated as an opposition to such petition. Section 1.429(g) of the rules provides that replies to such an opposition pleading are due ten days after the time for filing oppositions has expired. 47 CFR §1.429(g). The *Report and Order* in this proceeding was published in the *Federal Register* on August 25, 1998. 63 *Fed. Reg.* 45182. Therefore, although these comments do not constitute a "reply" to K95.5's Opposition, Metro respectfully submits that because the deadline for filing oppositions to petitions for

(continued...)

I. Background.

On November 26, 1996, Great Plains Radiocasting ("GPR") filed a Petition for Rulemaking seeking the allotment of Channel 294C2 to Detroit, Texas.² On January 24, 1997, the Commission issued a *Notice of Proposed Rule Making* in MM Docket No. 97-26, 12 FCC Rcd 1810 (1997), proposing the allotment of Channel 294C2 to Detroit. GPR filed comments on March 12, 1997, restating its intention to apply for a construction permit for the new station if Channel 294C2 were to be allotted to Detroit.

On June 30, 1998, GPR filed a "Withdrawal of Expression of Interest of Great Plains Radiocasting" ("Withdrawal"), withdrawing its expression of interest in the Channel 294C2 allotment at Detroit. In its Withdrawal, GPR certified that neither it nor its principals had received (or would receive) any consideration in return for the withdrawal of its expression of interest in this proceeding, and stated that no agreements existed regarding such withdrawal.

On August 21, 1998, the Commission issued a *Report and Order*, DA 93-1650 (released August 21, 1998) ("*R&O*"), which, *inter alia*, granted GPR's Petition for Rulemaking and allotted Channel 294C2 to Detroit, despite the fact that no other party had expressed an interest in applying for the Channel 294C2 allotment. In response to the *R&O*, GPR filed a "Request for Immediate Issuance of Erratum," dated September 3, 1998, in which it noted that the Commission apparently

¹(...continued)

reconsideration did not expire until October 9, 1998, these comments are timely filed and should be considered in this proceeding.

² Unless otherwise indicated, all communities referenced herein are located in the state of Texas.

had overlooked the filing of its June 30, 1998, Withdrawal because the *R&O* contains no mention of GPR's withdrawal of its expression of interest in the Detroit facility.

II. K95.5's Opposition.

In its Opposition, K95.5 claims that GPR's June 30, 1998, Withdrawal was "legally defective" because it did not entirely comply with Section 1.420(j) of the Commission's rules. Specifically, K95.5 notes that GPR's Withdrawal did not include a supporting affidavit as required by Section 1.420(j)(1) - (5) of the rules. *See* 47 CFR §1.429(j)(1) - (5). Accordingly, K95.5 claims that because a "valid withdrawal" of GPR's expression of interest was not filed prior to the adoption date of the *R&O*, the Commission should not delete the allotment of Channel 294C2 to Detroit. Opposition, pp. 2-4. K95.5 also expresses its own interest in applying for the Channel 294C2 facility at Detroit. *Id.* at 4-5.

III. The Commission Should Issue an Erratum Deleting the Allotment of Channel 294C2 at Detroit.

Attached hereto is a declaration of John Mitchell, a partner in GPR, in which Mr. Mitchell states that, on June 29, 1998, he authorized his counsel to file a withdrawal of GPR's expression of interest in the allotment of Channel 294C2 to Detroit. The declaration also expressly states that neither GPR nor any of its principals received or will receive any consideration for the withdrawal of GPR's expression of interest in the Detroit facility. Therefore, because Mr. Mitchell's declaration affirms that the filing of GPR's June 30, 1998, Withdrawal was at his request, and that no consideration was paid in return for such Withdrawal, the Commission should issue an erratum deleting the allotment of Channel 294C2 at Detroit because GPR's Withdrawal was filed prior to the

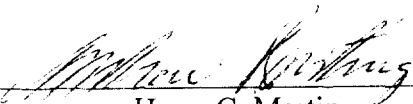
adoption of the *R&O*, and no other party expressed an interest in the Detroit facility prior to the comment deadline in this proceeding.

Furthermore, although K95.5 expressed an interest in the Detroit facility in its September 24, 1998, Opposition, it is well established that the Commission will not allot a new channel where a party fails to express an interest in the proposed allotment prior to the comment deadline. *St. Augustine, St. Augustine Beach, and Gainesville, Florida*, 7 FCC Rcd 4138 n.5 (Pol. Rul. Div. 1992), citing *Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988) (subsequent history omitted). The fact that K95.5 did not "contemplate that new channels could be allotted to both Detroit, Texas, and Antlers, Oklahoma" (Opposition, p. 4), does not constitute a satisfactory basis for the Commission to accept K95.5's late-filed expression of interest. The proper remedy is for K95.5 to file a rulemaking petition seeking the allotment of Channel 294C2 to Detroit. Indeed, although the Commission issued its *Notice of Proposed Rule Making* proposing the allotment of Channel 294C2 to Detroit over eight months ago, and K95.5 was served with a copy of GPR's June 30, 1998, Withdrawal, K95.5 has failed to offer any explanation of either why it did not file a timely expression of interest, or how it would be prejudiced by complying with the Commission's procedural rules and filing its own rulemaking petition seeking the allotment of Channel 294C2 to Detroit. Therefore, K95.5's grossly untimely expression of interest in the Detroit facility should not be considered, and the Commission should issue an erratum deleting the allotment of Channel 294C2 at Detroit.

WHEREFORE, in light of the foregoing, Metro Broadcasters-Texas, Inc. respectfully requests that the "Request for Immediate Issuance of Erratum," filed by Great Plains Radiocasting, and dated September 3, 1998, be GRANTED, and that the opposition pleading, filed September 24, 1998, by K95.5, Inc., be DENIED in all respects.

Respectfully submitted,

METRO BROADCASTERS-TEXAS, INC.

By: 
Harry C. Martin
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 N. Seventeenth Street
11th Floor
Arlington, Virginia 22209

October 13, 1998

c:\ask...martin\rm\greatpla.com

DECLARATION OF JOHN MITCHELL

I, John Mitchell, hereby declare and state under penalty of perjury that the following is true and correct:

I am a partner in Great Plains Radiocasting ("GPR"), which filed an expression of interest for the allotment of Channel 294C2 to Detroit, Texas in MM Docket No. 97-26.

As a partner in GPR, I authorized our lawyer, William J. Pennington, to file a withdrawal of GPR's expression of interest in Channel 294C2 at Detroit, Texas, and he did so on June 29, 1998.

As stated in Mr. Pennington's withdrawal notice, neither GPR nor any of its principals received, or is entitled to receive, any consideration for the withdrawal of such expression of interest.

Signed and dated this 6 day of October, 1998.


John Mitchell

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald and Hildreth, P.L.C., hereby certify that on this 13th day of October, 1998, copies of the foregoing "Comments of Metro Broadcasters-Texas, Inc.," were hand delivered or mailed first-class, postage pre-paid, to the following:

Andrew J. Rhodes*
Special Legal Advisor
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 536
Washington, DC 20554

John A. Karousos, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Ms. Kathleen Scheuerle*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Mr. Dale Bickel*
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 332
Washington, DC 20554

William J. Pennington, Esquire
P.O. Box 403
Westfield, Massachusetts 10186
Counsel for Great Plains Radiocasting

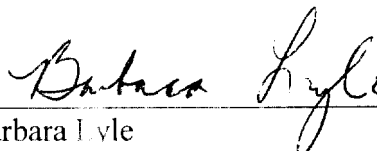
Roy R. Russo, Esquire
Lawrence N. Cohn, Esquire
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, DC 20036
Counsel for Hefel Broadcasting Corporation

Mark N. Lipp, Esquire
Shook Hardy & Bacon
Suite 600
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for Hunt Broadcasting, Inc.

Robert Healy, Esquire
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, DC 20036
Counsel for Jerry Snyder and Associates, Inc.

Erwin G. Krasnow, Esquire
Verner, Liipfert, Bernhard,
McPherson & Hand, Chartered
901 15th Street, N.W., Suite 700
Washington, DC 20005
Counsel for Graham Newspapers, Inc.

John F. Garziglia, Esquire
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, DC 20006
Counsel for K95.5, Inc.


Barbara Lyle